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Mailed: July 15, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Laser Karaoke, Inc., dba Karaoke Warehouse

Serial No. 76335835

Courtney J. Miller of Calfee, Halter & Griswold LLP for Laser Karaoke, Inc., dba Karaoke Warehouse.

Gwen P. Stokols, Trademark Examining Attorney, Law Office 102 (Thomas Shaw, Managing Attorney).

Before Simms, Seeherman and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Laser Karaoke, Inc., dba Karaoke Warehouse, has appealed from the final refusal of the trademark examining attorney to register the mark shown below for the following services (as amended):¹

Retail stores and retail store services available through computer communications for audio components specifically for use in karaoke, namely, (i) compact

¹ Application Serial No. 76335835; filed November 8, 2001, alleging dates of first use and first use in commerce on January 1, 2001.

discs containing songs that have been re-recorded by musicians other than the original artists, and in which some or all of the vocal lines may have been removed, and in which graphics such as song lyrics or other images have been added; (ii) compact disc players, (iii) audio amplifiers, (iv) microphones, (v) audio speakers, and (vi) cables.



Registration has been finally refused under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of applicant's services.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs. An oral hearing was not requested.

The Examining Attorney argues that TOP TUNES (stylized) describes the type of music applicant sells, i.e., "highly regarded or hit songs." (Brief, p. 3.) In support of her position, the examining attorney has made of record dictionary definitions of "top" and "tune"; and excerpts of articles from the NEXIS database and printouts from Internet websites containing references to "top tunes." The examining attorney notes that the evidence includes references to "top tunes" in

connection with music recorded or performed by both original and non-original artists.

Examples of the NEXIS articles are reproduced below (emphasis added):

A musical set in a radio station's studio includes some **top tunes** of the World War II era, ... *St. Louis Post-Dispatch* (April 7, 2002, Sunday Five Star Lift Edition).

A week from today, students will be dressed in period costumes, **top tunes** from the '30s and '40s will fill the air, ... *The Providence Journal-Bulletin* (May 24, 2001, South County Edition).

The parade will include bands, floats, horses and more. Bobby Stringer and the Special Touch Band will perform the **top tunes** of Motown and R&B at 7 p.m. ... *The Miami Herald* (April 27, 2001, Broward Edition).

...feature live bands and dance music from the '70s, '80s and '90s, appealing to the later-evening crowd. "It will be all the **top tunes** from that time, ... *The Atlanta Journal and Constitution* (January 10, 2001, Home Edition).

Dancing from the Roarin' '20s and '30s will be the rage when the 15-piece San Francisco Starlight Orchestra plays some of the **top tunes** of Paul Whiteman, Duke Ellington, Irving Berlin ... *The San Francisco Chronicle* (September 7, 2001, Final Edition).

Town's best singers sing Broadway's **top tunes**. *Albuquerque Journal* (September 16, 2001).

Applicant contends that in the evidence submitted by the examining attorney, "top tunes" is used "in reference to compilations of complete recordings of well-known songs performed by the original artist or other musicians." (Brief, p. 9.)

Applicant argues that while its compact discs (CDs) may include the melodies of well-known songs, the CDs applicant sells contain songs that have been re-recorded by musicians other than the original artists, and in which some or all of the vocal lines may have been removed, and in which graphics such as song lyrics or other images have been added. Therefore, according to applicant, TOP TUNES (stylized) is used in a fanciful way to refer to the sale of CDs "specifically and uniquely recorded and formatted for use with karaoke systems." (Brief, p. 9.)

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Moreover, the question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the term is used, and the possible significance that the term is likely to have to average purchasers as they encounter the goods or services in the marketplace. See In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

We agree with the examining attorney that TOP TUNES (stylized) when used in connection with retail store services for CDs for use with karaoke equipment conveys information about the

broad category of music contained on the CDs, that is, CDs featuring "top tunes."²

The evidence made of record by the examining attorney shows that "top tunes" describes a collection of popular or favorite songs. As can be seen from the NEXIS references, such collections could feature the "top tunes" of a particular artist (e.g., Duke Ellington), or an era (e.g., WW II, the 70s), or a theme (e.g., Broadway) or a genre of music (e.g., R&B). While "top tunes" may be traditionally associated with complete recordings by the original artists, the NEXIS evidence demonstrates that later bands may then perform these top tunes. Purchasers of the identified compact discs would certainly recognize that applicant is simply offering a karaoke version of those traditional recordings. We note that applicant's specimens advertise "top tunes" compilations similar to those described in the NEXIS materials. The selection includes:

Top Tunes CDG-091
Second in a series of the greatest hits of the 70s...

Top Tunes Fun Pack No. 15 & 16 - Christmas
... Carols of the best Christmas music ...

Top Tunes CDG-078
Sting/The Police--18 of the Greatest Hits...

² Moreover, the stylization of applicant's mark is not so distinctive as to create a commercial impression separate and apart from the term "TOP TUNES."

Serial No. 76335835

Top Tunes CDG-036
...42 of the best Children's Songs, including
Patriotic songs...

Top Tunes Teen Pack
105 Top POP Songs...

Top Tunes Country Pack
105 Top Country Songs...

The relevant purchasers of applicant's retail store services for karaoke CDs will recognize the meaning of "top tunes" in relation to those services and readily understand that applicant is selling karaoke recordings of "top tunes." This is a descriptive term that competitors of applicant should be free to use in connection with their own sale of karaoke CDs featuring "top tunes."

Decision: The refusal to register is affirmed.